Oriental Bank Bhd v Mohinder Pal Kaur a/p Tirlok Singh

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24–311–92
JEFFREY TAN JC
15 JULY 1995

Land Law *— Charge — Order for sale — Application to set aside order for sale — Chargee obtained order in absence of chargor — Whether order obtained regularly — Whether chargor showed cause to the contrary — National Land Code 1965 s 256(3) — Rules of the High Court 1980 O 83*

Land Law *— Charge — Order for sale — Variation of order for sale — Chargee obtained order by merging secured and unsecured loans — Whether chargor could set aside order — Whether chargee could recover unsecured loan from proceeds of sale of charged land — Whether order could be varied to exclude unsecured loan — National Land Code 1965 ss 206(3), 268*

Land Law *— Charge — Order for sale — Application to set aside order for sale — Chargor obtained postponement of order and time to settle loan — Chargor failed to settle loan and applied to set aside order — Whether application was bona fide — Whether there was inordinate delay in application — Whether chargor's explanation that she was an undischarged bankrupt satisfactory — Whether chargor's conduct showed application was not bona fide*

Civil Procedure *— Estoppel — Res judicata — Chargor obtained postponement of order on certain issues — Chargor subsequently applied to set aside order on similar issues — Whether chargor estopped from raising similar issues — Whether earlier proceedings had resulted in final judgment*

The defendant executed charges over her land in favour of the plaintiff in consideration of the plaintiff's credit facilities to a third party. The plaintiff demanded from the defendant repayment of not only the secured facilities but also an unsecured advance. The defendant failed to comply with the plaintiff's demand and the plaintiff applied for an order for sale of the defendant's land under s 256 of the National Land Code 1965 ('the NLC'). The hearing was adjourned. In default of the defendant's appearance at the adjourned hearing, the plaintiff obtained an order for sale ('the order'). The defendant then filed an appearance and applied to the court for a stay of the order ('the first application'). The court postponed the order and gave time to the defendant to settle the outstanding sum. After more than two years, the defendant applied to set aside the order on the ground that it was irregularly obtained because: (i) the defendant had not been served with a copy of the notice of adjourned hearing as required by O 83 of the Rules of the High Court 1980 ('the RHC'); and (ii) the plaintiff was not entitled to recover the unsecured advance from the purchase money arising from the sale of her land, and the order was therefore invalid for consolidating the secured

loans with the unsecured loan. The plaintiff contended that all of the defendant's objections had been raised at the hearing of the first application with the result that the defendant was estopped from re-canvassing the same issues which were res judicata. Furthermore, the defendant's application lacked bona fide and was intended to delay the plaintiff's action and the defendant was guilty of inordinate delay in applying to set aside the order. The defendant's explanation for her delay in making the application was that she was an undischarged bankrupt.

Held, dismissing the application but varying the order:

(1) A certificate under O 83 r 2(5) of the RHC proving the plaintiff's service of a copy of the notice of appointment for hearing, supporting affidavits and a copy of the notice of the appointment for the adjourned hearing on the receiver of the defendant's estate was filed. Accordingly, there was no basis for the defendant to allege that she had not been served with the notice of appointment for the hearing when the order for the sale of the land was granted. The order was obtained in compliance with O 83, and the defendant had to disclose a defence on merits in her application to set it aside (see p 795B–F); *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 and *Tang Chok Ching v Wong Ik Tieng & Ors* [1973] 2 MLJ 25 followed.

(2) Section 268 of the NLC provides, inter alia, that the purchase money arising from the sale of land should be applied in the payment of the total amount due under the charge and that any residue thereof should be paid to the defendant. There was, however, no provision in s 268 for the residue of the purchase money arising from the sale of the defendant's land to be paid to the plaintiff in payment of the unsecured advance nor was there consent of the defendant to the merger of the unsecured advance with the secured loans. Accordingly, to recover the unsecured advance, the plaintiff had to seek its remedies at common law as preserved by s 206(3) of the NLC (see p 795H–I and 796A–B).

(3) There was inordinate delay in the defendant's application and her explanation was unsatisfactory because her status as an undischarged bankrupt was never a bar to her application with the sanction of the Official Assignee (see pp 796G and 797C); *Sabah Bank Bhd v Sykt Bintang Tengah Sdn Bhd & Ors* [1992] 2 MLJ 588 followed.

(4) The defendant's unsatisfactory explanation for the delay coupled with her conduct in failing to settle the outstanding sum despite time granted by the court at her request justified the conclusion that the application was not bona fide (see p 797E).

(5) There was no defence on merits in the defendant's submission on the secured loans and she had failed to show a 'cause to the contrary' under s 256(3) of the NLC so as to set aside the order. Accordingly, the court's discretion to set aside the judgment entered in default of the defendant's appearance would be exercised by a refusal of the defendant's application but with the order varied so as to exclude the unsecured loan (see pp 796C–F and 797F–G); *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 and *Burns v Kondel* [1971] 1 Lloyd's Rep 554 followed.

(6) For the doctrines of res judicata, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decree. An order of sale made under s 256 of the NLC is not a final judgment or a decree and accordingly the plaintiff's submission on res judicata was not a reason for the refusal of the defendant's application (see p 797I); *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 followed.

[Bahasa Malaysia summary

Defendan telah menyempurnakan cagaran ke atas tanahnya kepada plaintif sebagai balasan pemberian kemudahan kredit kepada pihak ketiga. Plaintif telah menuntut daripada defendan bukan sahaja pembayaran balik kemudahan bercagar tetapi juga suatu pendahuluan tak bercagar. Defendan telah gagal mematuhi tuntutan plaintif dan plaintif telah memohon untuk suatu perintah jualan atas tanah defendan di bawah s 256 Kanun Tanah Negara 1965 ('KTN'). Pembicaraan telah ditangguhkan. Plaintif telah memperolehi satu perintah jualan apabila defendan gagal memasukkan kehadiran di pembicaraan tertangguh ('perintah tersebut'). Defendan kemudiannya memfailkan kehadiran dan memohon kepada mahkamah untuk penggantungan perintah tersebut ('permohonan pertama'). Mahkamah menunda perintah tersebut dan telah memberi masa kepada defendan untuk menyelesaikan jumlah yang terhutang. Selepas lebih daripada dua tahun, defendan telah memohon untuk mengetepikan perintah tersebut atas alasan ianya telah diperolehi luar aturan kerana: (i) defendan tidak disampaikan dengan satu salinan notis pembicaraan tertangguh seperti yang dikehendaki oleh A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); dan (ii) plaintif tidak berhak untuk mendapat kembali pendahuluan tak bercagar daripada wang belian yang timbul daripada jualan tanahnya, dan perintah tersebut dengan itu adalah tak sah bagi menggabungkan pinjaman bercagar dengan pinjaman tak bercagar. Plaintif berhujah bahawa kesemua bantahan defendan telah pun dikemukakan di pembicaraan permohonan pertama dengan keputusan bahawa defendan diestop daripada menimbulkan isu-isu yang sama yang res judicata. Tambahan pula, permohonan defendan kekurangan bona

fide dan bertujuan untuk melewatkan tindakan plaintif dan defendan bersalah atas kelewatan terlampau dalam permohonan untuk mengetepikan perintah tersebut. Penjelasan defendan atas kelewatannya dalam membuat permohonan adalah bahawa dia merupakan seorang bankrap yang belum dilepaskan.

Diputuskan, menolak permohonan tetapi mengubahsuai perintah tersebut:

(1) Satu perakuan di bawah A 83 k 2(5) KMT yang membuktikan penyampaian plaintif atas salinan notis tarikh bagi pembicaraan, afidavit-afidavit yang menyokong dan satu salinan notis tarikh bagi pembicaraan tertangguh ke atas penerima estet defendan telah difailkan. Ekoran itu, tiada asas untuk defendan mengatakan bahawa dia tidak disampaikan dengan notis tarikh bagi pembicaraan apabila perintah untuk jualan tanah telah diberikan. Oleh kerana perintah tersebut telah diperolehi dengan mematuhi A 83, defendan terpaksa mendedahkan suatu pembelaan berdasarkan merit dalam permohonan untuk mengetepikannya (lihat ms 795B–F); *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 dan *Tang Chok Ching v Wong Ik Tieng & Ors* [1973] 2 MLJ 25 diikut.

(2) Seksyen 268 KTN memperuntukkan, antara lain, bahawa wang belian yang diperolehi daripada jualan tanah hendaklah digunakan untuk membayar jumlah penuh yang terhutang di bawah cagaran dan bahawa jika adanya baki daripada wang belian ianya hendaklah dibayar kepada defendan. Walau bagaimanapun, tiadanya peruntukan dalam s 268 bagi baki wang belian yang diperolehi daripada jualan tanah defendan untuk dibayar kepada plaintif sebagai bayaran pendahuluan tak bercagar, dan tidak terdapat juga kebenaran daripada defendan kepada percantuman pendahuluan tak bercagar dengan pinjaman bercagar. Sewajarnya, untuk mendapat kembali pendahuluan tak bercagar, plaintif haruslah menuntut remedi di bawah common law seperti yang termaktub di dalam s 206(3) KTN (lihat ms 795H–I dan 796A–B).

(3) Terdapat kelewatan terlampau dalam permohonan defendan dan penjelasannya juga tidak memuaskan kerana kedudukannya sebagai seorang bankrap yang belum dilepaskan tidak pernah merupakan halangan kepada permohonannya dengan sanksi Pegawai Pemegang Harta (lihat ms 796G dan 797C); *Sabah Bank Bhd v Sykt Bintang Tengah Sdn Bhd & Ors* [1992] 2 MLJ 588 diikut.

(4) Penjelasan defendan yang tidak memuaskan untuk kelewatan disertai dengan kelakuannya dalam kegagalan menyelesaikan jumlah terhutang walaupun mahkamah telah memberi masa atas permohonannya memberikan justifikasi kepada kesimpulan bahawa permohonan itu adalah tidak bona fide (lihat ms 797E).

(5) Tidak terdapat pembelaan berdasarkan merit dalam penghujahan defendan mengenai pinjaman bercagar dan dia telah gagal menunjukkan 'sebab sebaliknya' di bawah s 256(3) KTN supaya perintah tersebut diketepikan. Sewajarnya, budi bicara mahkamah untuk mengetepikan penghakiman yang telah dimasukkan atas kegagalan defendan untuk memasukkan kehadiran akan dilaksanakan menerusi penolakan permohonan defendan tetapi dengan mengubahsuai perintah tersebut supaya mengecualikan pinjaman tak bercagar (lihat ms 796C–F dan 797F–G); *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 dan *Burns v Kondel* [1971] 1 Lloyd's Rep 554 diikut.

(6) Untuk pemakaian doktrin res judicata, estopel kausa tindakan atau estopel isu, prosiding lebih awal mestilah mengakibat dalam penghakiman atau dekri muktamad. Satu perintah jualan yang dibuat di bawah s 256 KTN bukanlah suatu penghakiman atau dekri muktamad dan oleh yang demikian, penghujahan plaintif berkenaan res judicata tidak merupakan satu alasan penolakan permohonan defendan (lihat ms 797I); *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 diikut.]

Notes

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1471–1500.

For cases on estoppel, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1208–1245.

For cases on res judicata, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1225–1238.

[*Editorial note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal No P–02–557–1995.]

Cases referred to

Arab Malaysian Credit Bhd v Chua Jiu Keng & Ors [1988] 2 CLJ 442

B Dialdas & Co (Pte) Ltd v Sin Sin & Co & Ors [1984] 2 MLJ 223

Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat [1979] 1 MLJ 23

Bank of America National Trust Savings Association v Cheong Hoon Chong [1983] 1 MLJ 285

Burns v Kondel [1971] 1 Lloyd's Rep 554

Cheong Sooi Loong, Re, ex p Hong Leong Finance Bhd [1992] 2 MLJ 591

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608

Hong Leong Finance Ltd v Tay Keow Neo & Anor [1992] 1 SLR 205

Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119

Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors [1983] 2 MLJ 384

Lau Ming Hing Richard v Bank Pembangunan Malaysia Bhd [1994] 2 MLJ 323

Malayan Banking Bhd v Sykt Jaya Perkakas (Sabah) Sdn Bhd [1993] 3 MLJ 503
PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd [1958] MLJ 113
Rabiyah bte Malek v Foo Tak Siong (Ngoh See Cheng, third party) [1994] 1 MLJ 583
Sabah Bank Bhd v Sykt Bintang Tengah Sdn Bhd & Ors [1992] 2 MLJ 588
Tan Ah Lew v Gurcharan Muntara Singh [1978] 1 MLJ 96
Tang Chok Ching v Wong Ik Tieng & Ors [1973] 2 MLJ 25
Tian Yan Onn Development Sdn Bhd v National Holdings Ltd & Ors [1988] 2 MLJ 669
United Malayan Banking Corp Bhd v Sykt Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352

Legislation referred to

Bankruptcy Act 1967 s 61(b)
National Land Code 1965 ss 206(3), 256(3), 268(1)(c), (1)(e), 339(3)
Rules of the High Court 1980 0 13 r 8, O 42 r 13, O 83 rr 2(1)–(5), r 3(6)

Surinder Singh (Ong & Manecksha) for the plaintiff.
Anoop Singh (Anoop Singh & Co) for the defendant.

Jeffrey Tan JC: This was the defendant's application by summons in chambers dated 9 May 1995 (encl 28) for:

(i) an order to set aside the order of 3 March 1993 ordering the sale by public auction of the above captioned land, and

(ii) an order for a stay of the order for sale until the disposal of encl 28.

The background facts to the defendant's application were as follows:

In consideration of the plaintiff's grant of overdraft and banking facilities to the extent of RM190,000 to Stanley & Co ('the firm') the defendant executed in favour of the plaintiff two (2) charges (Presentation No 2579/88, Jilid 373 Folio 149 and Presentation No 2905/88, Jilid 374, Folio 55) over land held under Geran (1st Grade) No 11172 Lot No 444, Sek 3 bandar Jelutong, daerah timur laut, Pulau Pinang ('the land') as security for the repayment of the said credit facilities.

On 18 November 1991, the plaintiff demanded from the defendant the full repayment of all sums then outstanding on: (i) the credit facilities secured by the aforesaid two charges; and (ii) the unsecured advance of RM30,000 granted on 15 December 1989, which the plaintiff alleged the defendant had agreed to furnish the security of a third charge.

The defendant failed to comply with the demand, and the plaintiff applied (encl 2) for the judicial sale of the land. Enclosure 2 was served on

the defendant on 26 May 1992, but hearing at the request of the plaintiff was adjourned from 6 January 1993 to 3 March 1993, who informed the court that the defendant might be an undischarged bankrupt. Enclosure 2 was heard on 3 March 1993, on which day in default of the defendant's appearance, the plaintiff obtained, inter alia, an order for the judicial sale of the land. The conditions for sale were settled by the learned Senior Assistant Registrar ('the SAR') on 6 May 1994.

The defendant filed an appearance on 4 June 1993, and applied (on 8 June 1993 — encl 16) for a stay of the auction sale set for 9 June 1993. In her affidavit (encl 17) in support of encl 16, the defendant alleged that the reserved price was too low and she had a purchaser for the land. On 8 June 1993, the court postponed the auction sale, and granted to the defendant at her request six months to settle the outstanding loan.

The ground relied on by the defendant in the instant application was that the order of 3 March 1993 was irregularly obtained, and must be set aside *ex debito justitiae* (see *Tan Ah Lew v Gurcharan Muntara Singh* [1978] 1 MLJ 96). The 'irregularities' canvassed during submissions were: (i) the plaintiff's non-compliance of O 83 of the Rules of the High Court 1980; and (ii) the unsecured advance of RM30,000 and its accrued interests were not realizable from the auction sale proceeds of the charged lands. According to the learned counsel for the defendant, those irregularities could not be waived (see *PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd* [1958] MLJ 113 at p 115), and non-compliance of O 83 r 3(6) was sufficient cause for the dismissal of the plaintiff's proceedings, a point made on the persuasive authority of *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608. Learned counsel, furthermore, argued that the order of 3 March 1993 was a nullity, 'and the defendant had the option either of ignoring it or going to the court and asking for it to be set aside' (see *United Malayan Banking Corp Bhd v Sykt Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352).

Submitting to the contrary, counsel for the plaintiff, however, contended that the reasons advanced on the irregularity were res judicata. He said it was raised by the defendant in encls 16 and 17 and deliberated at the hearing of encl 16, and the defendant was estopped from re-canvassing the very same issues. He furthermore contended: (i) encl 28 was lacking in bona fide and was intended to delay the plaintiff's action; (ii) a copy of the originating summons dated 24 April 1992 was served on 26 May 1992; and (iii) the defendant was guilty of inordinate delay. On the inordinate delay, counsel for the defendant's reply was that until the receiving order and adjudication order were set aside (on 11 April 1995), the defendant was not capable of making an earlier application.

It was not in dispute that the plaintiff's originating summons was a charge action, and the defendant's appearance was not filed on or before 6 January 1993 (the date fixed for first hearing). That being so, O 83 r 2(1) read together with r 2(2) required the plaintiff's service on the defendant of a copy of the notice of appointment for hearing and a copy of the affidavit in support of the summons. Since the hearing was adjourned from 6 January 1993 to 3 March 1993, and there were no directions by the

court, O 83 r 2(4) required the plaintiff's service on the defendant of a copy of the notice of the appointment for the adjourned hearing. Service under r 2(2) or r 2(4) was also provable by a certificate signed by the plaintiff or the plaintiff's solicitors (see O 83 r 2(5)). On 3 March 1993, there was no r 2(5) certificate. There was, however, an affidavit (encl 4) of the plaintiff's service on the defendant of the originating summons and supporting affidavit on 26 May 1992. The r 2(5) certificate from the plaintiff's solicitors (encl 34) was however filed although belatedly, and it attested to the plaintiff's service on the Assistant Official Assignee of Penang, the receiver of the defendant's estate, on 27 February 1993 of a copy of the 'notis temujanji', supporting affidavits and notice of the hearing on 3 March 1993.

There was, therefore, no factual basis for the defendant to allege that she was not served with the 'notis temujanji' for the hearing on 3 March 1993, the day the order sought to be set aside was granted. Similarly, on the claim that the plaintiff failed to particularize the outstanding account, the defendant overlooked the statements in the affidavit of the branch manager of the plaintiff (encl 1), which gave an account of the three advances (two secured and one unsecured); the interests accrued and the total arrears on 15 April 1992; and the supplementary affidavit (encl 9) updating the principal loan and interest as on 3 March 1993. The order of 3 March 1993 was, therefore, obtained in compliance with O 83. As the default order was regular, the defendant applying to set it aside must disclose a defence on merits (see *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23; *Tang Chok Ching v Wong Ik Tieng & Ors* [1973] 2 MLJ 25), as the same principles in setting aside judgments under O 13 r 8 of the RHC 1980 were applicable (as an analogy, see *Rabiyah bte Malek v Foo Tak Siong (Ngoh See Cheng, third party)* [1994] 1 MLJ 583).

There was merit in the defendant's submission that the plaintiff was not entitled to recover the third advance, the unsecured loan of RM30,000 and the interests thereon from the purchase money arising on the auction sale of the land.

The plaintiff's application for an order for sale was an exercise of its undoubted statutory rights as the registered chargee of the land. However, the remedies in Chapter 3 to Pt 16 of the National Land Code 1965 (the 'NLC') were only available to the plaintiff *qua* registered chargee, abiding by the Code. Section 268 of the NLC provides that the purchase money arising on the auction sale of the land, after payment of quit rent and expenses incurred in connection with the sale, shall be applied '... in the payment ... of the total amount due under the charge ...' (see s 268(1)(c)) and to '... the payment off of subsequent charges, if any, in the order of their priority' (see s 268 (1)(e)). The residue, if any, of the purchase money shall, subject to sub-s (3) of s 339, be paid to the defendant. There was, however, no provision in s 268 for the residue to be paid to the plaintiff in payment of the unsecured advance, nor were there documents signed by the defendant of her consent to the merger of the unsecured

advance with the secured loans (see *Bank of America National Trust Savings Association v Cheong Hoon Chong* [1983] 1 MLJ 285). For the recovery of the unsecured advance, the plaintiff must therefore seek its remedies at common law as preserved by s 206(3) of the NLC (see *National Land Code — A Commentary* (2nd Ed) by Judith Sihombing at pp 563–565).

Therefore, the impugned order, consolidating the secured and unsecured loans and ordering the sale of the land as the remedy for its total payment, gave to the plaintiff, riding as it were on its registered charges, a mode of recovery for the unsecured advance available only to a registered chargee which, in the case of the unsecured advance, the plaintiff was not.

Except for the latter there was, however, little else that was recognizable as a credible defence or a cause to the contrary (see s 256(3)) sufficient to refuse, and in the instant case by setting it aside, the sale of the land. On the meaning of 'cause to the contrary' in s 256(3) of the NLC, the then Supreme Court in *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors* [1983] 2 MLJ 384 explained that 'cause to the contrary' requires the court to decide whether there are circumstances sufficient to refuse the chargee's application although the charge is lawfully and validly created and the chargor's default is proved, and for a chargor to 'show cause' either in law or equity against an application for sale, and that the court should refuse to make an order where it would be unjust to do so, an exposition still relevant despite the Privy Council's reversal of the Supreme Court's judgment. In the instant application and in encls 16 and 17, not only were the validity of the two charges, the firm's receipt of the advances secured by the charges and default not disputed, the defendant readily admitted to the secured loan of RM190,000. The thrust of the defendant's 'cause to the contrary' was entirely on the plaintiff's non-compliance of O 83 and the consolidation (in the order for sale) of the unsecured with the secured advance.

Further, there was inordinate delay in the application to set aside the order for sale that was not satisfactorily explained. Order 42 r 13 (effective 1 August 1993) now requires an application such as encl 28 to be made within 30 days of the order intended to be set aside. Although on 3 March 1993 there was no such time limit, it was yet incumbent on the defendant to make a prompt application (see *Tian Yan Onn Development Sdn Bhd v National Holdings Ltd & Ors* [1988] 2 MLJ 669). On 8 June 1993, the defendant applied (encls 16 and 17) for a stay of the auction sale fixed for 9 June 1993. Therefore, by 8 June 1993 if not earlier, the defendant had knowledge of the order for sale. Yet she took no steps to have the order for sale set aside until after two years had lapsed. What is reasonable time must depend on the facts and circumstances of each case. But in the instant case there was inordinate delay, and the defendant was required to explain why she had not acted promptly after she had been aware of the order for sale (see *Arab Malaysian Credit Bhd v Chua Jiu Keng & Ors* [1988] 2 CLJ 442). Although the predominant consideration in an application to set aside a regular judgment is whether there is a defence on merits, unexplained delay is a relevant consideration; and delay unexplained

may justify a conclusion that the application to set aside the judgment was not bona fide (see *Malayan Banking Bhd v Sykt Jaya Perkakas (Sabah) Sdn Bhd* [1993] 3 MLJ 505) and that the conduct of a defendant in ignoring the service of process when judgment was allowed to be entered in default was deliberate (see *Hong Leong Finance Ltd v Tay Keow Neo & Anor* [1992] 1 SLR 205).

In her affidavit, the defendant offered an explanation — she was an undischarged bankrupt, and receiving order and adjudication order was only set aside on 11 April 1995 —but the explanation was feeble and less than reasonable. The defendant's status as an undischarged bankrupt was never a bar to her application with the sanction of the official assignee (see *Sabah Bank Bhd v Sykt Bintang Tengah Sdn Bhd & Ors* [1992] 2 MLJ 588) or to an application by the Official Assignee (see s 61(b) of the Bankruptcy Act 1967) who has a duty to look after not only the interests of creditors, but that of the debtor as well (see *Re Cheong Sooi Loong, ex p Hong Leong Finance Bhd* [1992] 2 MLJ 591; also *Lau Ming Hing Richard v Bank Pembangunan Malaysia Bhd* [1994] 2 MLJ 323, where Lau's contention that there was no inordinate delay on his part in applying to set aside the order by reason of bankruptcy proceedings was not accepted). The unsatisfactory explanation for the delay coupled with the defendant's conduct — her failure to settle the loan despite the time granted by the court to her at her request — left the court little option but to conclude that her application was not bona fide.

It is said that O 13 r 8 of the RHC 1980 gives a completely unfettered discretion to the court to set aside a judgment entered in default of appearance (see *B Dialdas & Co (Pte) Ltd v Sin Sin & Co & Ors* [1984] 2 MLJ 223). However, in the absence of a defence on merits, explained by Lord Denning in *Burns v Kondel* [1971] 1 Lloyd's Rep 554 as 'a defence which discloses an arguable and triable issue', and there was none on the two charges, and the inordinate delay in the application to set aside that was not satisfactorily explained, that unfettered discretion must be, and was, exercised in the instant case by a refusal of the defendant's application.

Yet, to allow the order of 3 March 1993 to stand — the merger of the secured and unsecured accounts — for the reasons given above, was not right. The order of 3 March 1993 was, therefore, varied: (i) by the deduction of the unsecured advance and all its accrued interests; and consequently, (ii) the amount due and owing by the defendant on the two charges was recalculated as RM300,203.88, being principal and interest as of 15 July 1995 to be recoverable from the sale of the said land.

For completeness, it must also be said that all objections raised by the defendant in encl 28 were raised by her in encl 16, and to reopen the same issues as she did in encl 28 was an abuse of the process of court, and even res judicata in that sense. However, it is settled law that in order for the doctrines of res judicata, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decree (see *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 at p 123)

and an order for sale made under s 256 of the NLC is not a final judgment or decree.

The Supreme Court per Eusoff Chin SCJ (as he then was) at p 123 said:

> it is equally settled law that in order for the doctrines of res judicata, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a *final* judgment or decree; ... This requirement is not met by foreclosure proceedings which, as we have observed earlier, do not result or terminate in a final judgment or decree.

The plaintiff's submission on res judicata was, accordingly, not a reason for the refusal of the defendant's application.

Application dismissed.

Reported by Wong Kian Kheong